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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1290

BROWN & WILLIAMSON TOBACCO CORPORATION, et al.,
Petitioners,

v.

CALVIN J. COLLIER, CHAIRMAN,
FEDERAL TRADE COMMISSION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and Application for Stay Pending Review by This Court

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PETITIONERS' REPLY BRIEF

May, 1976

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PETITIONERS' REPLY BRIEF

The government's brief in opposition acknowledges the basic principle, deeply rooted in this Court's decisions ever since *Ex parte Young*, 209 U.S. 123 (1908), that a stay of penalties for alleged violations of an administrative order should be granted *pendente lite* where a party must incur the threat of accruing penalties as the price of exercising its right to judicial review, so as effectively to preclude the "substantial, adequate and safely available" exercise of that right. *See Wadley So. Ry. Co.* v. *Georgia,*

235 U.S. 651, 661 (1915). (Br. in Opp. 5-6.) The government does not even attempt to defend the holding upon which the Court of Appeals based its denial of relief in this case—that the *Ex parte Young* principle does not apply where an "interpretation" rather than the "validity" of an administrative order is being attacked. (A. 10a-11a.) Instead, it contends that this principle is inapplicable here on the ground that petitioners do not "claim that the denial of the stay will lead them to abandon their challenge" in this case. (Br. in Opp. 5.) This specious reasoning is not only inconsistent with petitioners' contentions in this case and with this Court's decisions, but, if accepted, it will seriously erode the safeguards established in *Ex parte Young*.

Petitioners have steadfastly asserted throughout this litigation, that, in the absence of a stay of daily mounting penalties, they confront a very real dilemma as to whether they should change their advertising practices which they believe to be lawful, or challenge the Commission's contrary assertions at the risk of massive, cumulating penalties. Both courts below recognized the existence of this dilemma as well as the substantiality of the issues the petitioners are raising on the merits. The government does not, and it cannot, deny that the very purpose of the overhanging threat of penalties here is to force petitioners to abandon their present conduct and forgo their right to judicial review of the substantial questions they have raised.

Having presented petitioners with the Hobson's choice of litigating under a threat of penalties or succumbing, the government cannot reasonably maintain that a stay is not necessary if petitioners choose to

litigate rather than to acquiesce in the Commission's demands. The government's contention to the contrary was effectively rejected by this Court when it granted a stay of penalties pending its final disposition in *St. Regis Paper Co.* v. *United States,* 365 U.S. 858 (1961). This Court granted the stay in that case—where the amount of potential penalties was only $100 a day—even though the petitioner had not only not abandoned its challenge to the Commission's ruling, but in fact had lost on the merits in both courts below.

In attempting to distinguish the *Ex parte Young* line of cases, the government argues that, whether or not there is a stay in this case, petitioners will have to litigate because of the Commission's view that they have been violating the orders for almost three years prior to the filing of this suit. (Br. in Opp. 5.) But the potentiality that penalties might be imposed for pre-litigation conduct in no way diminishes the chilling effect of the threat of mounting penalties for every day that the litigation continues.[1] If anything, the government's formulation

[1] The pernicious effects of the Commission's determination here go beyond the issue of inhibiting petitioners' ability to seek judicial review. The record makes clear that a purpose of the determination was to coerce petitioners into a settlement on terms favorable to the Commission. (See App'l App. 228, 274-75). Moreover, the Commission's determination also carries the threat that petitioners could be charged with wilful violations regarding any current or future advertising that does not conform to the Commission's interpretation. *See United States* v. *J. B. Williams Co.*, 354 F. Supp. 521, 552 (S.D.N.Y. 1973), *rev'd without consideration of the point*, 498 F.2d 414 (2d Cir. 1974) (disregard of FTC Staff's interpretation alleged to be evidence of bad faith or reckless disregard). In this way, the determination itself may put petitioners to a greater risk than the consent orders standing alone.

presents petitioners with an additional, even more acute, dilemma: If petitioners want to avoid past, *i.e.*, pre-complaint, penalties they must litigate. But if they litigate to avoid past penalties, they thereby disqualify themselves, according to the government's argument, from the otherwise applicable protection of a stay against continuing penalties *pendente lite*. Surely, the applicability of the basic due process principle embodied in *Ex parte Young* and its progeny cannot be made to turn on this sort of Catch-22 rationalization.[2]

Moreover, the potentiality of pre-complaint penalties refutes the government's suggestion that petitioners are seeking risk-free litigation. Petitioners are prepared to take all normal litigating risks to defend the charges of alleged violations. But those normal risks may not be exacerbated by the threat of constantly mounting penalties for each day petitioners persist in pursuing their right to judicial review of the substantial questions they have raised.[3]

[2] The only case cited by the government in support of this novel proposition of law is *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949). (Br. in Opp. 5.) That case it totally inapposite. It involved liability for *past* actions which a court had already adjudged to be in violation of a decree the court had earlier entered under the Fair Labor Standards Act. There was no agency order involved and there was no issue at all as to continuing liability for the same acts or relief *pendente lite*.

[3] The government seeks to distinguish *Ford Motor Co.* v. *Coleman*, 402 F. Supp. 475 (D.D.C. 1975), *affirmed per curiam*, No. 75-870, April 19, 1976 (Justices Stewart, Powell, and Stevens dissenting) on the ground that the appellant there was required to make a showing that it had launched a "substantial, nonfrivolous challenge" to the agency order and that there is no " 'free ride' to litigate without any risk of penalties . . . ." (Br. in Opp. 7, n.6, quoting 402 F. Supp. at 490.) As discussed in the text above, petitioners here seek no such "free ride." Moreover, in noting that petitioners have raised serious questions on the merits, both courts below have, in effect, concluded that petitioners' showing meets the *Ford* standard.

As we have noted, the government's rationalization is put forth in lieu of an argument supporting the theory upon which the court below based its decision. The validity of that theory—that the *Ex parte Young* line applies only to cases challenging the "validity" and not the "interpretation" of an administrative order—is the important federal issue presented for review by this Court. As we discussed in our petition, this purported distinction is utterly without merit. (Pet. at 13-17.)

The government's brief states only that the fact that petitioners are not challenging the validity of the Commission's consent orders is "a further factor militating against" a stay. But the government does not explain the relevance or weight of this "factor."[4] Instead, it simply begs the ultimate question on the merits by asserting that if petitioners are liable it is because their interpretation will prove to be wrong and the Commission's correct. (Br. in Opp. 7.)

In this connection, the government seeks to avoid the impact of prior Commission statements that petitioners were in compliance with the orders. With respect to the Commission's acceptance of petitioners' compliance reports in December 1972, the government asserts that the Commission "claims" that the

[4] Similarly, the government intimates that the discretionary nature of the penalties is of some relevance (Br. in Opp. 6-7) but does not indicate what that relevance is. Petitioners have already made clear that this factor is utterly without relevance. (Pet. at 17-18.)

matters now in dispute "were not disclosed in the compliance reports, or were disclosed inaccurately or improperly." (Br. in Opp. 6, n.5.) Petitioners believe this claim is demonstrably erroneous and that it will be rejected at trial. Moreover, this belated assertion by the Commission of defects in the compliance reports does not explain away the Commission's own reports to Congress, filed in early 1973 and 1974, stating that "all cigarette advertisements observed by the Commission Staff were being published in accordance with the terms of these orders."[5] In any event, the ultimate resolution of the question whether the Commission's present interpretation of its orders is correct cannot affect the threshold question of a stay *pendente lite* which is involved here. For present purposes it is sufficient to note that both courts below have acknowledged—and the government's brief does not contest—that petitioners have raised "serious questions on the merits." (A. 14a, 17a.)

CONCLUSION

For the foregoing reasons and the reasons stated in our petition, the petition for a writ of certiorari should be granted, and an order should be entered staying the accumulation of civil penalties pending final action by this Court.

Respectfully submitted,

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[5] Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act*, December 31, 1972, p. 2. *See also* Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act*, December 31, 1973, p. 1.

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